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NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,
Petitioner,

-vs-

DENNIS WAYNE RUMSEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

IN A STATE WHERE IN THE CAPITAL SENTENCING PROCEDURE THE TRIAL COURT IS REQUIRED TO IMPOSE A SENTENCE OF DEATH IF THE STATE PROVES THE EXISTENCE OF ONE OR MORE AGGRAVATING FACTORS AND THE DEFENDANT FAILS TO PROVE ANY MITIGATING FACTORS, IF THE TRIAL COURT ERRS AS A MATTER OF LAW AND CONCLUDES THAT THE FACTS PROVED BY THE STATE DO NOT ESTABLISH AN AGGRAVATING CIRCUMSTANCE, MAY THE STATE APPELLATE COURT VACATE THE LIFE SENTENCE AND REMAND FOR A RESENTENCING WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The 1983 Arizona Supreme Court opinion holding that a resentencing of Rumsey is precluded by the double jeopardy clause is reported in 136 Ariz. 175, 665 P.2d 48 (1983). The Arizona Supreme Court opinion remanding the Rumsey case for resentencing is reported in 130 Ariz. 427, 636 P.2d 1209 (1981).

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court holding that resentencing Rumsey was precluded by the double jeopardy clause was entered on April 14, 1983. The state's motion for rehearing before the Arizona Supreme Court was denied on June 14, 1983. A petition for writ of certiorari was filed by the State of Arizona within 60 days from that denial. The petition was granted by this Court on

January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On December 6, 1979, Dennis Rumsey was charged with armed robbery and first-degree murder. In October, 1979, Mr. Rumsey and a female companion were

hitchhiking when George Koslosky picked them up. When all three stopped to buy some beer, Rumsey noticed that Koslosky had money and he told his companion he was going to rob Koslosky. Later, while Rumsey was driving Koslosky's vehicle, he pulled off the road, woke Koslosky, who was sleeping in the backseat, and, at gunpoint, ordered him to empty his pockets. Rumsey then shot Koslosky and left him beside the road.

Rumsey went to trial before a jury in June of 1980. He was convicted of armed robbery and first-degree murder and, on July 3, 1980, in accord with Ariz.Rev.Stat.Ann. § 13-703, a hearing to determine sentence was held before the trial court. (J.A. 1-52.) As is permitted by statute, the state cited evidence adduced at trial to show that the following three statutory aggravating

circumstances existed: (1) Rumsey "created a grave risk of death to another"[1]; (2) Rumsey committed the offense expecting pecuniary gain[2]; and (3) Rumsey committed the crime in an "especially heinous, cruel or depraved manner"[3]. (J.A. 11, 14, 23.) In mitigation[4] Rumsey presented the foreman of the trial jury as a witness. He testified that the murder verdict rested on the felony-murder theory advanced by the state and added that the jurors felt a life sentence was appropriate. (J.A. 7, 9.) Four days later, July 7, 1980, the trial court decided that Rumsey's acts had not

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1. Ariz.Rev.Stat.Ann. § 13-703(F)(3).
2. Ariz.Rev.Stat.Ann. § 13-703(F)(5).
3. Ariz.Rev.Stat.Ann. § 13-703(F)(6).
4. Ariz.Rev.Stat.Ann. § 13-703(G).

created a grave risk of death to another, that Rumsey did not commit the offense in an especially heinous, cruel or depraved manner, and although the murder-robbery was committed for pecuniary gain that statutory circumstance was not applicable to Rumsey because it applied only to hired killers and was not meant to reach those who murdered to rob. (J.A. 53-57.) Also, the trial court decided that Rumsey had shown no mitigation. Because the court found no aggravating circumstances, the court could not impose a death sentence under Arizona law.[5] Rumsey was sentenced to life for the murder and 21 years for the robbery, the robbery sentence to run consecutively to the life sentence. (J.A. 72-73.)

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5. Ariz.Rev.Stat.Ann. § 13-703(E).

Three weeks after the sentencing, the Arizona Supreme Court, in an unrelated case, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), cert. denied, 449 U.S. 1067 (1981), ruled that the pecuniary gain aggravating circumstance was not limited to hired killers and that it did apply to those who robbed for pecuniary gain as Rumsey had.

Both Rumsey and the state appealed from the July 7, 1980, sentences. Rumsey appealed the imposition of consecutive sentences[6]; the state appealed from the imposition of a life sentence[7]. Then on December 8, 1981, the Arizona Supreme Court vacated Rumsey's life sentence for murder and remanded for resentencing on

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6. Ariz.Rev.Stat.Ann. § 13-4033.

7. Ariz.Rev.Stat.Ann. § 13-4032.

the first-degree murder conviction. The basis for the supreme court's ruling was that the trial judge had "erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, 130 Ariz. 427, 431-32, 636 P.2d 1209, 1213-14 (1981).

On February 1, 1982, the same trial judge who originally sentenced Rumsey held a second sentencing hearing. No evidence was presented by either party but both counsel argued. The state argued that the trial court was free to find that the crime had been committed for pecuniary gain and free to impose a death sentence. Rumsey argued that Bullington v. Missouri, 451 U.S. 430 (1981), prevented the court from imposing a death sentence. (J.A. 99-102, 110-12.) On February 4 the trial court

found that one aggravating circumstance existed, Rumsey had committed the crime for pecuniary gain. The court also found that no mitigation had been shown and imposed a death sentence. (J.A. 118-24.)

Appeal of the death sentence to the Arizona Supreme Court was automatic under Rule 31.7, Arizona Rules of Criminal Procedure. On April 14, 1983, that court ruled that the interpretation this Court placed upon the double jeopardy clause in Bullington prevented the trial court from imposing a death sentence once it had imposed a life sentence. State v. Rumsey, 136 P.2d 175, 665 P.2d 48 (1983).

SUMMARY OF ARGUMENT

The Arizona Supreme Court decision that Dennis Rumsey may not be resentenced to death after receiving a life sentence is based solely upon its conclusion that

Bullington v. Missouri, 451 U.S. 430, required that result. The Arizona Supreme Court compared the Missouri and Arizona sentencing procedures, found that they had a number of similar provisions and concluded that, although there were differences, there were not enough to distinguish the two and held that the life sentence had to be treated as an acquittal of a death sentence. That analysis, however, is faulty for it places too much emphasis on the framework and the mechanics of the systems and overlooks the reason why the Double Jeopardy Clause insists upon finality where there is an acquittal.

The overriding objective of the Double Jeopardy Clause is to guard against government oppression. In particular, the Clause protects a citizen from repeated attempts by the state to convict

him of an offense. If a citizen is acquitted after trial he may not be tried again. The state had its opportunity to prove its case, it did not, and it will not be given a second chance. But this quality of finality has not been traditionally applied to sentences. The pronouncement of a sentence has not been viewed as an acquittal of any higher sentence. Thus, a sentence once pronounced may be changed, increased and appealed by the government. The Bullington decision, however, alters that tradition and in some situations treats the pronouncement of a sentence as an acquittal of a higher sentence. At least where the system that produced a death penalty is nothing more than a part of the trial on guilt, Bullington equates the pronouncement of a sentence with an acquittal on guilt.

But Bullington did not involve, as this case does, a contention that there was error prejudicial to the state at the first sentencing proceeding. Just as important as the double jeopardy protection against the state taking a second bite at the apple, is the opportunity accorded the state to present its case and have the issues determined by the factfinder or sentencer free from error. There is no government oppression involved where the state seeks only that one opportunity to present its case error free. Thus, this Court has said, consistent with the Double Jeopardy Clause, that the state may appeal from legal error at trial or sentencing and may have that error remedied, as long as there has not been an acquittal. United States v. DiFrancesco, 449 U.S. 117; United States v. Scott, 437 U.S. 82. In

this case that is all the state sought. Bullington does not prevent that.

Even if Bullington was meant to apply to situations like Rumsey's and to bar a state from having its proof considered free from legal error, there are significant differences between the Arizona and Missouri procedures that distinguish the two and do not require Arizona to follow Bullington. Those things that are the hallmarks of a jury trial and which are part of the statutory procedure in Missouri are not part of Arizona's procedure. In Arizona at sentencing there is no jury, there are no closing arguments, there are no instructions to the jury, the rules of evidence are followed only part of the time, and sympathy and compassion have no part in the sentencing process. Moreover, Arizona does not treat the

pronouncement of a sentence like an acquittal on guilt. The state may appeal errors of law that occurred during a trial and it may appeal a sentence that is too lenient. Except for the range of sentences available, a death sentencing proceeding in Arizona is like any other sentencing.

If this Court meant in Bullington to carve out an exception to the rule that the pronouncement of a sentence is not final, then it should consider overruling Bullington. Bullington is after all an aberration and it creates an area of uncertainty in the law of double jeopardy because the finality of new sentences can be judged only by how similar the system that produced them is to Missouri's procedure.

ARGUMENT

The issue in this case is a narrow one. Dennis Rumsey was found guilty of first-degree murder. If, at the subsequent sentencing hearing, the trial court found the existence of one of the statutory aggravating circumstances and found no mitigating circumstances, the court was required to impose a death sentence. At that hearing, the state proved the existence of one aggravating circumstance, that Rumsey murdered the victim to rob him, a murder for pecuniary gain. Although Rumsey could show no mitigation, he received a life sentence because the court erroneously concluded that the statutory aggravating circumstance of pecuniary gain applied only to hired killers.[8]

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8. To raise Rumsey's armed robbery sentence from the statutory presumption

The issue is whether that error may be corrected and whether a subsequent death sentence violates the Double Jeopardy Clause.

I. The pronouncement of a sentence is not an acquittal.

Government appeals in criminal cases are not prohibited by the Double Jeopardy Clause. The government may appeal from an adverse ruling during trial [United States v. Scott, 437 U.S. 82 (1978)], from an adverse ruling after trial and verdict [United States v. Wilson, 420 U.S. 332 (1975)], and from a sentence [United States v. DiFrancesco, 449 U.S. 117 (1980)]. One restriction the Double Jeopardy Clause places upon government

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of 7 years to the consecutive 21-year sentence imposed, the trial court found as aggravation that Rumsey planned the robbery for pecuniary gain. Ariz.Rev.Stat.Ann. §§ 13-702. (J.A. 66.)

appeals is a prohibition against appealing from an adverse ruling during trial after a jury has acquitted the defendant. This restriction protects the defendant against multiple trials for the same offense. The acquittal is final and may not be reopened regardless of what errors have been made. In this regard, however, sentences are treated differently from jury verdicts of acquittal.

This Court has never considered the pronouncement of a sentence to be an acquittal of any higher sentence. For instance, this Court has said that a sentence may be increased during the same term of court. Ex Parte Lange, 18 Wall 163 (1874). The Court has upheld sentences after retrial more severe than the original sentences. Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North

Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919). The Court has permitted a trial court to correct a sentence by increasing it [Bozza v. United States, 330 U.S. 160 (1947)], and the Court has permitted the government to appeal what the government considers an inadequate sentence. United States v. DiFrancesco, 449 U.S. 117 (1980). Traditionally, sentences have not had the finality of jury verdicts. Only once has the Court recognized an exception to that tradition and that was in Bullington v. Missouri, 451 U.S. 430 (1981). There the Court blurred the traditional distinction between sentences and acquittals. The stated reason for this was that the Missouri procedure that led to Bullington's sentence was so like the procedure that leads to a jury acquittal that, for double jeopardy

purposes, the two could not be distinguished. The Missouri procedure was not like that in any of the Court's previous cases where the imposition of a particular sentence was not regarded as an acquittal. The Missouri procedure was by statutory design and effect a trial on the issue of punishment.

In this case the Arizona Supreme Court compared the Missouri and Arizona death sentencing procedures and felt the similarities were such that Bullington required a finding that Dennis Rumsey's life sentence was as final as a jury verdict and could not be altered. But there are significant differences in the two procedures that do not demand that they be treated alike. And more importantly, the manner in which the factual matters were handled and resolved in Bullington is so different from the

treatment of the factual matter in Rumsey's case that Bullington does not require that the results be the same.

II. Bullington v. Missouri does not come into play in this case.

The significant fact that distinguishes this case from Bullington is that here the trial court did not resolve any factual issue against the state which upon resentencing required further proceedings devoted to factual resolutions. The trial court found, as the state urged, that Rumsey committed the crime for pecuniary gain.[9] But because the court believed that that

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9. Rumsey did not argue at the initial sentencing hearing that the crime had not been committed for pecuniary gain. He argued, as the trial court found, that even if it had been, the pecuniary gain aggravating circumstance found in the death penalty statute applied only to hired killers. (J.A. 37-39.)

aggravating circumstance in the death penalty statute applied only to hired killers, the court refused to apply it in determining Rumsey's sentence for murder. It was this erroneous refusal that the state appealed. Thus, when the Arizona Supreme Court reversed and remanded for resentencing no facts had to be resolved. The only thing left to do was correct the trial court's error.

In Bullington factual issues were resolved against the state at the initial sentencing and a resentencing would have involved retrying those factual disputes.

III. Arizona's death sentencing procedure is different from Missouri's.

In Arizona, once a defendant has been convicted by a jury of first-degree murder, the jury has nothing more to do with the case. Sentence is determined by

the trial court after a hearing during which the court decides if any statutory aggravating circumstances exist, if any mitigating circumstances have been shown, and whether the mitigation is substantial enough to call for leniency. If the court determines that a statutory aggravating circumstance is proved beyond a reasonable doubt and that no mitigation has been shown, the court must impose a death sentence. State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). If an aggravating circumstance has been proved and mitigation has been shown but it is not substantial enough to call for leniency, the court must impose a death sentence. If the court finds that no aggravating circumstance has been proved, the court must impose a life sentence.

In addition to the absence of a jury as sentencer, the Arizona and Missouri

procedures differ in the following ways:

(1) Closing arguments are provided for by statute in Missouri, not in Arizona.

(2) Instructions are given to the jury in Missouri. There are no instructions in Arizona.

(3) In Missouri the rules of evidence are followed as to both aggravating and mitigating evidence. In Arizona the rules of evidence do not apply to mitigation.

(4) In Missouri the jury must be convinced beyond a reasonable doubt that the aggravating circumstances it finds are sufficient to warrant the death penalty. In Arizona the trial judge is not required to make a separate determination that the death penalty is warranted.

(5) In Missouri even if the jury is convinced that an aggravating

circumstance exists and that it outweighs the mitigation, it may refuse to impose the death sentence. This gives the defense the opportunity to use its forensic skills to convince the jury that regardless of what aggravation and mitigation has been shown, the jurors should allow their compassion alone to spare the defendant's life. This cannot happen in Arizona because when aggravation exists and no mitigation is shown or the mitigation does not outweigh the aggravation, the judge must sentence to death.

Missouri's capital sentencing procedure closely resembles a trial on the issue of guilt. A Missouri jury, in the traditional manner of trials on guilt, determines whether the state has proved its case and when it determines that a life sentence is appropriate it has, in a

real sense, determined that the state has not proved its case for death. Arizona's procedure is not as adversarial or final and in most ways is similar to the procedure outlined in DiFrancesco which this Court distinguished in Bullington from the Missouri procedure.

In a typical Arizona sentencing hearing, the prosecutor begins by listing for the court the evidence he presented at trial which shows one or more of the aggravating circumstances required to impose a death sentence. [This is similar to what the government did in United States v. DiFrancesco, 449 U.S. at 124.] The prosecutor may introduce certified copies of prior convictions to show aggravation [as the government did in United States v. DiFrancesco, 449 U.S. at 124]. The court then calls upon the defense to present its mitigation. The

defense attorney may refer to things that were in evidence at trial. He may, because he does not have to follow the rules of evidence, relate things he has learned about the defendant, his background and his family. He may cite defendant's age. He may argue defendant's relative culpability and the culpability of others, and he may attack the showing of aggravation [as the defense did in United States v. DiFrancesco, 449 U.S. at 124]. Although permitted, there is rarely rebuttal evidence from the state.

Once the state has cited the applicable aggravation evidence and the defense its mitigation, each side may argue how that evidence fits into the categories of aggravation and mitigation defined by the statute and case law. Usually this is done by citing for the trial court

Arizona Supreme Court opinions defining the aggravating factors. In Rumsey's case the prosecutor summarized the law on pecuniary gain and two other aggravating circumstances. Following that, the trial court states what aggravation it finds, what mitigation it finds, and whether the aggravation outweighs the mitigation [in a manner similar to the trial court's findings in United States v. DiFrancesco, 449 U.S. at 124]. If death is imposed, an appeal to the Arizona Supreme Court is automatic. Once the appeal is perfected, the supreme court conducts an independent review of the aggravating and mitigating evidence and comes to its own conclusion on sentence. State v. Gretzler, 135 Ariz. at 54, 659 P.2d at 13 (1983). The supreme court looks at everything anew, determines for itself what is and what is not aggravation and mitigation, and then

does its own weighing, aggravation against mitigation. This review has resulted in the reduction of nine death sentences to life, six in which the supreme court concluded, contrary to the trial judge's finding, that the mitigation was substantial enough to call for leniency,[10] and three in which the supreme court found insufficient evidence to sustain the trial court's finding of aggravation.[11]

Because of this comprehensive review,

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10. State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 237 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977).

11. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975).

the trial court sentencing in Arizona is not the final step. In almost every case to go before the supreme court the defendant has asked the court to upset the trial court's findings and impose a life sentence or he has asked that the case be remanded for resentencing. The trial court hearing is the beginning of a winnowing process where both the aggravation and the mitigation begin to take form.

Although the state at the sentencing hearing may show as aggravation only those things admissible under the rules of evidence, the purpose of that restriction probably is not to make the sentencing proceeding more like a trial, but to require more credibility and reliability of the facts upon which the death sentence may rest. The same thing may be said of the requirement that the

aggravating factors be proved beyond a reasonable doubt. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980).

Once a death sentence is imposed the defendant is not the only one who can appeal a death sentence in Arizona. The state can appeal a death sentence if it is illegal[12], and the state may appeal a question of law when the defendant is convicted and appeals.[13] Appeals in cases where a death sentence or a life sentence has been imposed go directly to the Supreme Court.[14] The Arizona Supreme Court has not yet determined whether the state can appeal a life sentence where the defendant does not appeal.

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12. Ariz.Rev.Stat.Ann. § 13-4032(6).

13. Ariz.Rev.Stat.Ann. § 13-4032(4).

14. Ariz. Const., art. 6, § 27; Ariz.Rev.Stat.Ann. § 12-120.21.

This death sentencing procedure is no different from the procedure for imposing sentences less than death. In all non-death penalty cases, the trial court is the sentencer. After conviction the trial court holds a presentencing hearing or reviews a presentence report to determine what aggravation and mitigation exists, many of the statutory aggravating and mitigating factors are the same as they are in death cases, at the conclusion of the hearing the trial judge states on the record the aggravation and mitigation he finds, and the trial court weighs aggravation and mitigation to arrive at an appropriate sentence[15]. Arizona has never considered this procedure to be a continuation of the guilt trial and the fact that the state

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15. Ariz.Rev.Stat.Ann. § 13-702.

may appeal if the trial court imposes anything other than the statutory presumptive sentence[16] shows that Arizona does not consider pronouncement of a sentence an acquittal of any higher sentence.

IV. Arizona did prove its case against Rumsey at the sentencing hearing.

If the Arizona procedure were a continuation of the trial at which the state is required to muster its forces for the one chance it gets to prove its case for death, it did prove its case against Rumsey. The state proved that Rumsey robbed and murdered for pecuniary gain and the trial court found that it did, but erroneously refused to apply it to the death sentence. All the state asked for on appeal was that the error be corrected. If one of the basic values of

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16. Ariz.Rev.Stat.Ann. § 13-4032(6).

the Double Jeopardy Clause is to protect against multiple trials for the same offense where the state has once failed to prove its case, that value will not be diminished by allowing the state to correct an erroneous sentence where the state did prove its case. A correction will not allow the state to regroup and try once more to prove its case of death against the defendant because it does not have to; it has already done that.

The effect of allowing such a correction is similar to the effect of allowing the state to appeal an erroneous directed verdict of acquittal by the trial court after a jury has found the defendant guilty. See United States v. Wilson, 420 U.S. 332. Correcting the error the trial court made in entering the directed verdict does not subject the defendant to another trial, and does not

give the state another opportunity to prove its case; it merely reinstates the finding of guilt that has already been made. Correcting the trial judge's error in this case does not give Arizona another opportunity to prove its case; it simply allows a finding already made to be applied correctly.

V. Bullington v. Missouri should be overruled.

This case is a good opportunity for the Court to reassess its holding in Bullington. Bullington is an anomolous decision. In United States v. DiFrancesco, announced just a few months before Bullington, this Court reiterated traditional law that "the imposition of sentence does not operate as an implied acquittal of any greater sentence." DiFrancesco, 449 U.S. at 136, n. 14. Yet in Bullington the Court failed to pay due

deference to that tradition and to long-standing decisions recognizing a fundamental difference between sentencing and determinations of guilt or innocence. Bullington obscures that difference and renders the double jeopardy concept that much more uncertain because the finality of future sentences can only be determined by gauging how similar the procedures that produced them are to a jury trial on guilt.

Moreover, considerations of stare decisis should not deter this Court from overruling Bullington. See United States v. Scott, 437 U.S. at 101. As this Court recognized in Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, 429 U.S. 363 (1977)[17],

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17. Oregon overruled a case decided three years earlier, Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

considerations of stare decisis play a less important role in constitutional issues than they do in cases involving substantive property laws. Therefore, in construing the Double Jeopardy Clause, continuity, certainty and sound policy should overcome stare decisis in the overruling of Ellington.

CONCLUSION

The life sentence imposed upon Dennis Rumsey was erroneous. The facts presented by the state at the initial sentencing hearing proved an aggravating circumstance, that the murder was committed for pecuniary gain; but the trial court erroneously interpreted that circumstance to apply to hired killers only and imposed a life sentence. Where the state has proved its case in the trial court, and the life sentence

imposed is the result of legal error, the state should be permitted an appeal to correct that error. The judgment of the Supreme Court of Arizona precluding correction of that error should be reversed.

Respectfully submitted,

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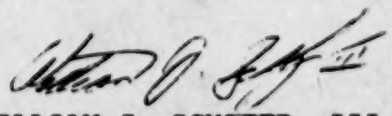

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